U.S. Department of Labor Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue date: 19Apr2002

CASE NUMBER: 2001-LHC-2685

OWCP NO.: 07-158608

IN THE MATTER OF

RICHARD DICKERSON,
Claimant

v.

MISSISSIPPI PHOSPHATES CORP.,
Employer

and

U.S. FIDELITY & GUARANTY CO.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-interest

APPEARANCES:

Tommy Dulin, Esq.
On behalf of Claimant

Kelly Sessoms, Esq.
On behalf of Employer

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Richard Dickerson (Claimant) against Mississippi Phosphates Corp. (Employer), and U.S. Fidelity & Guaranty Co. (Carrier). The Director, Office of Workers' Compensation Programs (Director) is named as a party-in-interest. The issues raised by the parties could not be resolved

administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 17, 2002, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty-three exhibits, which were admitted, including: various Department of Labor filings; various photographs; the depositions of Frank Marshall Thomas, Jr., Carl A. Budinich, Jr., and Clay Eugene Law; medical records from Drs. John McCloskey, Edward Connolly (Ochsner Medical Clinic), Vernon Doster, F. H. Savoie, Chris Wiggins, Donald Sawyer, and Y.C. Joe Chen; medical records from Digestive Health Center, VA medical records; Claimant's wage statements; the personnel file of Claimant; and social security records.[1]

Employer introduced eleven exhibits, which were admitted, including: Claimant's employment, work schedule, and wage records; various photographs; a plant map; various medical excerpts; a surveillance video; the C.V. of Charles G. Miller; and a hypothetical vocational evaluation with a job market survey.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of the accident/injury was March 8, 1998;

2. The injury occurred in the course and scope of employment;

3. An employer-employee relationship existed at the time of the accident;

4. Employer was advised of the injury on March 8, 1998;

5. A Notice of Controversion was filed on December 7, 2000;

6. Employer paid wage benefits for 194 weeks totaling $54,277.32 and,

7. Employer paid medical benefits totaling $53,180.90.

---

[1] References to the transcript and exhibits are as follows: Trial Transcript- Tr.__; Claimant's Exhibits- CX-__, p.__; Employer Exhibits- EX-__, p.__; Administrative Law Judge Exhibits- ALJX-__, p.___.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction/Coverage;

2. Whether Claimant's current condition was caused by his employment;

3. Nature and extent of disability and date of maximum medial improvement;

4. Suitable alternative employment and adjustments;

5. Medical authorization;

6. Average weekly wage;

7. Credit; and

8. Penalties, interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Prior to working for Employer, Claimant had worked at Kamtech, Inc., as a pipe-welder; Local 119 in Mobile, Alabama, in the pipe and steam-fitters union; and TVA. (Tr. 28-29). On January 29, 1998, Claimant began to work for Employer in the temporary maintenance department, as a "B" Mechanic, working primarily as a welder. (EX 1, p. 6; CX 11, p. 5).

Also prior to working for Employer, Claimant had sustained injures the muscles in his back while working in Mobile during the 1980's, which required three days of leave from work. (Tr. 93). In May 1998, Claimant reported to Dr. McCloskey that he had suffered back problems over the years, referring to the muscles in his back and not disc or bone problems. (Tr. 95). Additionally, in 1972, Claimant was involved in an auto accident that required him to have 180 stitches on his head. (EX 6, p. 1; CX 15, p. 23). In 1967 Claimant cut his left index finger, and in 1955 he broke his left arm. *Id*. At the time of his hire, Claimant was being treated for gout. *Id*.

On Sunday, March 8, 1998, Claimant was injured while welding at the Employer's phosphoric acid plant, about 150 to 200 yards from the waters edge, when the ladder he was standing on broke. (Tr. 32). Claimant fell about five feet hurting his leg, back, neck and shoulders. (Tr. 32, 36). Claimant reported the injury to his supervisor, Clay Law, and stopped working. (Tr. 32). Clay Law told him that the doctor's office was closed, and he did not respond to Claimant request for emergency room care. (Tr. 45). Claimant then

went to Employer's First-Aid facility where his leg was cleaned. (Tr. 45-46). Claimant returned to work on Monday and Tuesday, and on Wednesday, March 11, 1998, Claimant saw the company physician, Dr. Doster. (Tr. 100; EX 2, p. 19-20; CX 15, p. 12, 14).

Claimant related to Dr. Doster that he had left leg, cervical and lumbar pain as well as chemical inhalation after he fell climbing a wooden ladder "injuring the mid portion of the lower portion of his left leg, hitting his back, popping his neck and twisting the lower portion of his back." (CX 15, p. 12). X-rays revealed anterior osteophytes involving the lower cervical vertebral bodies and lower lumbar vertebrae. (CX 15, p.16). Dr. Doster's impression was that Claimant had "[c]ervical and lumbar strain, contusion of the left leg and bilateral shoulder and hi[p] strain, history of toxic chemical inhalation and bronchitis." *Id*. at 12. Dr. Doster limited Claimant to light duty work until the pain resolved, specifically limiting Claimant to no bending, climbing, prolonged standing, and no lifting greater than twenty pounds. *Id*. at 15. Nevertheless, Clay Law placed Claimant back on full duty shortly thereafter. (Tr. 49).

On March 31, 1998, Claimant re-injured himself lifting a heavy object causing pain in the lower back and upper portion of the right buttock. (CX 15, p. 12). Claimant also stated that on March 31, 1998, he re-injured himself by stepping down the wrong way off a forklift. (Tr. 86). Claimant elected not to go to the doctor for these injuries because he felt that he had ample mediation at home. (Tr. 86). After reporting his injury to his supervisor, Claimant allegedly said that he "quit" and would come back later to pick up his tools. (Tr. 69, 139; EX 1, p. 7).

On April 2, 1998, Claimant returned to Dr. Doster and new x-rays were suggestive of spondylolisis at L5-S1 and large anterior osteophytes at L3, L4, and L5. (CX 15, p. 9, 12) Dr. Doster's new impression was that Claimant had [l]umbar back pain, spondylolisis, probable degenerative disc disease and osteoarthritis." *Id*. at 12. Dr. Doster recommended that Claimant not return to work. *Id*. at 8. On April 8, 1998, Dr. Doster decided to return him to light duty work with no lifting over twenty pounds because of his improved lumbar back pain and spondylolisis. *Id*. at 6. When Claimant returned to work with these restrictions he was told that there was no work available for him. (Tr. 80, 163). On April 15, 1998, Dr. Doster opined that Claimant may have degenerative joint disease and a possible disc disorder. (CX 15, p. 6).

On April 22, 1998, Claimant underwent a CT scan which revealed that the L5 disc had a "prominent vacuum phenomenon with prominent spurring extending out from its articular edges." (CX 15, p. 2). Claimant also had "bilateral spondylolisis producing grade II spondylolisthesis," but no disc herniation or spinal stenosis was present. *Id*. After obtaining these results, Dr. Doster referred Claimant to Dr. McCloskey for a lumbar evaluation and continued Claimant's work restriction indefinitely. *Id*. at 1.

On May 12, 1998, Claimant described his symptoms to Dr. McCloskey as deep pain the small of his back, knife like pain on twisting, bending, leaning and walking, kidney area pain, and radiating leg pains that made him "absolutely sick." (CX 12, p. 137). Dr. McCloskey opined that Claimant was suffering from a suspected symptomatic spondylolisthesis at L5, recent low back injury, massive obesity, hypertension, a multiple level degenerative disc disease of the lumbar spine, gout, and he noted that Claimant was on aspirin prophylaxis. *Id*. at 131. Dr. McCloskey further commented that the complaints seemed bona fide and that Clamant had a disc bulge and spinal stenosis at L4. *Id*.

An x-ray report, dated June 8, 1998, confirmed grade II spondylolisthesis of L5-S1; ventral defects at L2-3 and L3-4 ; and relative spinal stenosis at those levels. (CX 12, p. 126). Although there was no evidence of disc herniation, the spinal canal was congenitally small particularly at L2-3. *Id.* An ultrasound of the abdomen produced a small non-obstructing left renal calculus (kidney stone) but was otherwise unremarkable considering Clamant's size. *Id*. at 125.

By June 30, 1998, Dr. McCloskey related to Claimant that he had "hurt problems and not a harm problem and he [did] not have to have surgery." (CX 12, p. 114). No surgical procedure would enable Claimant to return to heavy or strenuous work. *Id*. Claimant asked for a referral to Dr. Connolly at the Ochsner Clinic and while Claimant was waiting to see Dr. Connolly, Dr. McCloskey sent Claimant to physical therapy at the George County Hospital. *Id*. at 115.

On July 22, 1998, Claimant underwent a neurosurgical consultation with Dr. Connolly regarding a possible need for a lumbar fusion for a spondylolisthesis. (CX 13, p. 1). Dr. Connolly opined that unless Claimant "had nerve root signs or evidence of a progressive slip . . . he [was not] a candidate for lumbar fusion." *Id*. Dr. Connolly further stated that "[i]f he did show signs of a radicular compression or progressive slip, then he would need to lose about 75 pounds before he would really be a satisfactory candidate to undergo a spinal fusion." *Id*.

On August 29, 1998, Dr. McCloskey agreed that surgery would be futile unless Claimant lost about one-hundred pounds in some sort of medically supervised weight loss program. (CX 12, p. 85). On September 9, 1998, Dr. McCloskey stated that Claimant's obesity and spondylolisthesis were pre-existing but that Claimant was not incapacitated until his work-place injury permanently aggravated his previously asymptomatic problem. (CX 12, p. 82). In regards to his injury, Dr. McCloskey assigned a ten percent permanent partial physical impairment to the whole body and limited Claimant to sedentary work. *Id.* Dr. McCloskey opined, however, that Claimant continued to need medical treatment and may end up having to undergo surgery. *Id*.

On September 22, 1998, Claimant underwent an "independent medical examination" with Dr. Terry Smith, a specialist in spinal and neurological surgery, who noted that Claimant weighed 300 pounds. (CX 12, p. 79). Dr. Smith agreed with Dr. McCloskey's diagnosis and noted that Claimant's spondylolisthesis at L5-S1 exerts a traction on the L5 nerve root laterally which would create neurogenic claudication type pain. *Id*. at 80. Dr. Smith recommended surgical decompression and fusion after Claimant lost weight. *Id*.

November 11, 1998, carrier approved a two month medically supervised weight loss program, after which it wanted to review the results to determine if further authorization was warranted. (CX 12, p. 62). By May 19, 1999, however, Claimant had not lost any weight. *Id*. at 42.

On June 30, 1999, Dr. McCloskey noted that Claimant was having difficulty driving a car for long distances and that Claimant felt totally incapacitated. (CX 12, p. 25). Claimant's weight was 302 pounds and Dr. McCloskey conceded that the weight loss program was a failure for Claimant. *Id.* A new set of x-rays, taken July 8, 1999, reconfirmed grade II spondylolisthesis of L5-S1 and L5-S1 disc disease with degenerative changes. *Id*. at 24. An MRI of the lumbar spine taken on the same date, however, revealed bilateral spondylolisis with a grade I spondylolisthesis at L5-S1 with the anterior lithiasis of L5-S1 producing a severe bilateral forminal stenosis. The MRI also revealed a moderate sized central L5-S1 disc herniation contributing to mild stenosis and a broad based central protrusion at L3-4 producing mild stenosis. *Id*. at 23. After

reviewing and comparing the results, Dr. McCloskey opined that the results were unchanged, and recommended against surgery despite Claimant's continued pain. *Id*. at 20. Because Claimant was a year post-injury, Dr. McCloskey opined that Claimant had reached maximum medical improvement and was limited on what he could do on a permanent basis. *Id*.

On October 11, 1999, Dr. McCloskey's impression was that Claimant had post-traumatic low back syndrome secondary to spondylolisthesis at L5 and spinal stenosis, multiple level degenerative disc disease of the lumbar spine, arthritis in neck and shoulders, massive obesity, hypertension, and non-insulin dependent diabetes mellitus. (CX 12, p. 11). Dr. McCloskey assigned a fifteen percent permanent partial impairment to the whole body as a result of his back injury and opined that Claimant was permanently limited to sedentary or very light type work. *Id*. at 12. Although he ordered x-rays for Claimant's neck and shoulders, Dr. McCloskey stated that he had no plans for surgery and advised Claimant on obtaining Social Security Disability. *Id*.

After reviewing new x-rays of Claimants neck, shoulders, and back, Dr. McCloskey remarked on March 15, 2000, that the right shoulder showed some mild degenerative changes, there was some arthritis and degenerative changes in the neck and a small disc herniation at C4-5 that may be responsible for some of Claimant's difficulty. (CX 12, p. 5). On April 25, 2000, Dr. McCloskey's diagnosed a frozen shoulder and herniated necleus pulposus at C4-5. Dr. McCloskey opined that the frozen shoulder was a result of his neck injury and disc herniation and referred Claimant to Dr. Wiggins. *Id*. at 2. In regard to the neck and shoulder injuries, Dr. McCloskey stated that he reached maximum medical improvement and had a 5% permanent partial impairment to his body as a whole, which combined with a 15% impairment to the body as a whole due to his lumbar condition, created a 20% total permanent partial physical impairment. *Id*.

Dr. Chen examined Claimant on May 15, 2000, at Sun Coast Pain Management Center in relation to Claimant's complaints of low back , neck and shoulder pain. (EX 19, p. 12). Dr. Chen's assessment was lumbar spondylolisis, lumbar disc disease, cervical spondylolisis, cervical disc disease, right shoulder pain, and cervical radiculopathy down the right side. *Id*. at 13. Dr. Chen's plan was to undertake medial branch blocks for consideration of future radio-frequency ablation, and evaluate Claimant for chronic narcotic therapy. *Id*. On May 24, 2000, Dr. Chen assessed myofascial pain and administered the medial branch blocks. *Id*. at 11. On June 21, 2000, Claimant reported excellent pain relief and underwent additional medial branch blocks. *Id*. at 9.

On May 23, 2000, Dr. Wiggins treated Claimant for frozen shoulder syndrome on a referral from Dr. McCloskey. (CX 17, p. 7). Dr. Wiggins reviewed x-rays of Claimant's right shoulder and opined that they were normal. *Id*. at 8. Claimant related that Dr. McCloskey had released him to return to work, but Dr. Wiggins revoked that return to work status and stated that it was unlikely he would return to work at all. *Id*. at 7. On June 23, 2000, a right shoulder arthrogram of Claimant's shoulder indicated that he had a rotator cuff tear and moderate degenerative disease with spurring on the articular edges. (EX 17, p. 5). Dr. Wiggins interpreted an MRI taken on June 14, 2000, as showing supraspinatus tendon with fraying which exemplified either tendinitis or full thickness tear, and minimal osteoarthritis of the shoulder. *Id*. at 2. On June 27, 2000, Dr. Wiggins diagnosed a torn right rotator cuff and advised Claimant on surgery and rotator cuff repair. *Id*. at 1. Claimant insisted on a micro-surgical approach, and Dr. Wiggins referred Claimant to Dr. Savoie. *Id*. Dr. Wiggins further stated that a twenty percent permanent partial disability to the right upper extremity was appropriate for Claimant based on his condition. *Id*.

Dr. Savoie, of the Mississippi Sports Medicine & Orthopaedic Center, first treated Claimant on August 16, 2000. (CX 16, p. 2). An x-ray revealed a significant degenerative joint disease with a large inferior humeral spur leading Dr. Savoie to opine that Claimant had glenohumeral degenerative joint disease. *Id*. After some injections and physical therapy, Dr. Savoie noted on September 6, 2000, that Claimant was not any better. Dr. Savoie told Claimant that his option was to live with the pain, (which ranged between 5 and 8 on a ten point scale), or undergo "arthroscopic debridement with cuff repair, decompression and Mumford, major chondroplasty of the glenohumeral arthritis or do shoulder replacement with rotator cuff repair." (CX 16, p. 1). Of the available options, Claimant selected "arthroscopic clean out [with] . . . laser chondroplasty, decompression, Mumford and cuff repair." *Id*. On December 4, 2000, Dr. Savoie performed surgery to repair Claimant's shoulder. (Tr. 55). Dr. Savoie discussed performing another operation on Claimant for a complete shoulder replacement. (Tr. 60).

On September 8, 2000, Claimant underwent radio-frequency lesioning at L4-5 and L5-S1 facet joints with Dr. Chen. (CX 19, p. 7). On September 21, 2000, Claimant reported that his pain was reduced by fifty percent. *Id*. at 6. On November 27, 2000, Claimant rated his pain level as a 4-5 out of ten, and on January 8, 2001, Claimant reiterated persistent pain in his sacral area leading Dr. Chen to assess possible sacroiliac joint pain. *Id*. at 3-5. On January 18, 2001, Claimant received a caudal epidural steroid injection, and when Claimant's pain increased, Dr. Chen refused to administer any more injections and referred Claimant back to Dr. McCloskey for further treatment. *Id*. at 1-2.

On April 12, 2001, Dr. Sawyer, a urologist, examined Claimant on the referral of Dr. Chen for urinary incontinence due to his work-place injury. (CX 18, p. 8). Claimant reported the he urinated every hour during the day -four or five times at night - and had fecal incontinence. *Id*. at 4. Dr. Sawyer's initial impression was that Claimant had urinary incontinence and urge incontinence of unclear etiology but opined that it was likely due to a neurogenic bladder as a result of his back injury. *Id*. at 3. Dr. Sawyer also thought Claimant had benign prostatic hypertrophy, fecal incontinence, hypertension, DM type II asbestosis, Asthma with possible COPD, ASCVD with angina, SP surgery on right shoulder, SP excision of skin cancers, recurrent pneumonia, erectile dysfunction which may either be vascular or neruogenic. *Id*. A pelvic ultrasound, performed on April 24, 2001, showed a somewhat misshapen urinary bladder extending superiorly out of the pelvis. *Id*. at 6. An abdomen ultrasound, performed on May 4, 2001, showed mild bilateral nephromegaly and hepatomegaly. *Id*. at 5. On September 12, 2001, Dr. Sawyer referred Claimant to Dr. Selman for further evaluation and possible surgery. *Id*. at 1-2.

B. Claimant's Testimony

Claimant testified that his job for Employer was in the temporary maintenance department where he operated equipment, performed welding, operated forklifts, cherry-pickers, and front-end loaders. (Tr. 31). Typically, Claimant worked five days a week, but a lot of the time he worked seven days a week. (Tr. 31). Claimant's supervisor, Clay Law, told him that he had a good chance of becoming a permanent employee. (Tr. 31-32).

On Sunday, March 8, 1998, Claimant was welding at the phosphoric acid plant, when the ladder he was standing on broke while he was standing about four or five feet off the ground. (Tr. 32, 36). Claimant testified that he had no reason to believe the ladder was defective. (Tr. 74). Claimant fell backwards, hurting his leg, neck and shoulders, his "whole body." (Tr. 32). Specifically, Claimant testified:

> The best I remember, I fell back and my head hit the back of the ladder - - hit the ladder. The back of my head hit the ladder. And I finally got myself down out of the ladder and my left leg was hung on it, and I got down to the - - I was hurting pretty good there, so - - but I ended up on the ground on the deck there. And that's about the extent of what I remember of it. I was hurting. I was in a lot of pain.

(Tr. 33).

Claimant reported the injury to his supervisor, Clay Law, and stopped working. (Tr. 32). When Claimant visited Dr. Doster on March 11, 1998, he reported that he had pain in his lower back, legs, shoulders, and neck. (Tr. 47). On March 31, 1998, Claimant's last day of work, he injured himself while stepping off a forklift, but Claimant elected not to go to the doctor because he felt that he had ample mediation at home. (Tr. 86). When asked to describe his current condition on the date of the hearing, Claimant reported:

> A: [I have pain in m]y neck, shoulders, both shoulders, lower back, lower lumbar, and my hips, my knees.
>
> . . .
>
> [A]t times in my lower lumbar, its like an ice pick, its real sharp. My shoulder - - my right shoulder especially is the same. At certain times it feels like you stuck a knife into it.
>
> My shoulder hurts. It has a hurt to it all the time. But at times it's real sharp, acute. And my lower lumbar is the same.
>
> Q: Have the injuries that you sustained in this accident caused you any changes as far as your activities, as your physical activities?
>
> A: Oh, yes, sir. . . . [S]ome of the pain in my lower lumbar is improved, but as far as my being able to bend and pick up or go fishing, carry a gun or most any kind of activity, I'm out of the ball game.
>
> . . .
>
> Q: Do you feel that you are, at this point in time today, able to do the work that you were performing when you worked for Mississippi Phosphate?
>
> A: No, sir. . . . My shoulder injury, my lower lumbar injury, standing up - - being able to stand and stoop and pick up and just about - - any part of it, I wouldn't be able to do.

(Tr. 59-60, 62).

Claimant also stated that he has difficulty dressing, bathing, cleaning, driving, doing yard work and any task that requires stooping. (Tr. 67-69). As a result of his physical condition, Claimant obtained Social Security Disability on February 21, 2001, in the amount of $1,049.00 per month. (Tr. 67, CX 23).

Claimant estimated that the place of his injury, inside the phosphoric acid plant, was approximately 150 to 200 yards from where he was assigned the duty of picking up pilings. (Tr. 37). As far as Claimant knew, the phosphoric acid plant was "separate and apart" from the docks. (Tr. 85). Claimant also stated that his subsequent injury, which occurred when he stepped down from a forklift, on March 31, 1998, occurred on land, away from the docks, at the temporary shop. (Tr. 86).

Claimant testified that his waterfront duties consisted of removing wooden pilings from the water at the same place where barges would park. (Tr. 37). Claimant estimated the stack of pilings that he had to remove was nine feet high and they were stacked both on dry land and extending into the water. (Tr. 38). To reach all the pilings that were in the water, Claimant used a cherry-picker that was set on a boom over the water. (Tr. 39). It was Claimant's understanding that the pilings were once used to tie up ships and barges. (Tr. 40).

Additionally, a pipe ran through the area where Claimant was removing the pilings, along the water's edge, which transported fresh water, and Claimant was assigned the task of repairing it. (Tr. 42). Of the total time Claimant worked for Employer, from January 29, 1998, to March 31, 1998, Claimant stated that he spent two or three weeks removing wooden pilings or working on pipes along the waters edge. (Tr. 44, EX 1, p. 6-7). Neither injury, however, occurred near the waters edge. (Tr. 92). Apart from removing the pilings and repairing the pipe, Claimant never engaged in loading or unloading a vessel, never worked in Employer's Materials Handling Department, and never did any maintenance or repair work on any equipment used for loading and unloading vessels. (Tr. 92).

Claimant's employment terminated on March 31, 1998, when he spoke with Clay Law and was told that his services were no longer needed. (Tr. 61). Claimant then spoke with Carl Budinich who related to Claimant that the temporary maintenance job was winding down and considering Claimant's condition, he could not think of any job Claimant could effectively perform. (Tr. 61). Claimant, on the other hand, testified that he never quit his job. (Tr. 69). When Clamant stayed at home, he made sure to call Employer's personnel department to let them know that he could not show up for work. (Tr. 79). Regarding his signature on the Employer's personnel action form stating that he had quit, Claimant testified that when he signed the document there was nothing written on it. (Tr. 74). A few days after Claimant "quit" he returned to work to talk with Clay Law and Carl Budinich and was told that he was being laid off. (Tr. 80).

Afterwards, Claimant attempted to find alternative employment on his own. (Tr. 88). Claimant spoke with personnel from South Mississippi Security and Kamatech, Inc., but they said that they did not have any work available at the time he inquired. (Tr. 88). Claimant also applied at the Coke plant in Lucedale, but was unable to contact the hiring personnel after many tries. (Tr. 88-89). Also, Claimant filled out paperwork in Pascagoula with Mississippi State Employment Services and made two phone calls to Employer, but was unable to gain employment. (Tr. 89-91).

C. Testimony of Trial Witnesses

C(1) Testimony of Kenneth Pounds

Mr. Pounds, the Employer's safety manager since August 2000, was responsible for reviewing and

implementing safety procedures for Employer's facility. (Tr. 106-07). Mr. Pounds testified concerning the production procedure at the plant for producing the fertilizer diammonium phosphate. First, raw materials are imported by ship, stored at a specific location and conveyed into the facility for conversion into sulfuric acid. Second, the sulfuric acid is changed into phosphoric acid and that product is then shipped to the third department that makes the diammonium phosphate fertilizer. (Tr. 107-08). After the third stage, the phosphoric acid is granularized, stored in a warehouse, and shipped by rail, trucks, barges and ships. (Tr. 108). The Materials Handling Department is the crew that helps to move the raw materials from the vessels, and loads the final product for shipment. (Tr. 109-110).

The phosphoric acid plant itself has nothing to do with unloading the barge or with maritime activity. (Tr. 110). The phosphoric acid plant had no connection to the docks by way of a conveyor or other means. (Tr. 111). The materials that arrive by ship are taken from the dock to a separate storage facility and a conveyor then moves those material in to the sulfuric acid manufacturing facility as needed. (Tr. 120). The phosphoric acid plant is geographically separate from the docks and one-hundred percent functionally independent outside of the manufactured products that flow in and out. (Tr. 111). The phosphoric acid plant actually sits on an independent grid, with separate roads for ingress and egress, and has a separate drainage system. (Tr. 11-12). Mr. Pounds further testified that the phosphoric acid plant was about 100 feet from Bayou Cassat, a navigable waterway, and that the phosphoric acid plant was about one-hundred yards from the potash slip where Claimant was removing wooden pilings. (Tr. 119).

C(2) Testimony and Deposition of Clay Eugene Law

Claimant noticed the deposition of Mr. Law on November 12, 2001. (CX 11, p. 1). Mr. Law's position for Employer was an "A" mechanic and he was Claimant's supervisor when the accident/ injury occurred in March 1998. *Id*. at 4. Mr. Law related that Claimant was hired as a welder but also performed some fitting duties, steel fabrication, and pipefitting. *Id*. at 5.

Mr. Law hired Claimant as part of a temporary crew to do a specific job in a certain time frame on a "shutdown," after which he was going to be "let go" from employment. (CX 11, p. 5). After suffering his workplace injury, Claimant reported to Mr. Law that he had soreness and bruising in his lower back, and Mr. Law saw an abrasion on the left leg. *Id*. at 6-7. Two other employees, Robert Stringfellow and Dellwood Tanner witnessed the accident. *Id*. at 7. Mr. Law specifically told Claimant not to use the ladder that he was injured on because it was unsafe. *Id*. at 8.

Mr. Law related that several weeks after Claimant fell from the ladder, Claimant reported that he stepped off a forklift and injured his back. (CX 11, p. 10). That injury occurred on the same day Claimant quit. *Id*. At rial Mr. Law testified that he offered Claimant medical attention for his back, but that Claimant was aggravated and turned in the key to his tool box stating that he would be back later for his tools. (Tr. 139). Mr. Law also related to Claimant that if he was quitting he had to fill out the proper paperwork. (Tr. 139-40). Mr. Law wrote that Claimant had "quit" and he alleged that Claimant saw the comments before the signed the paper. (Tr. 141). A little over two weeks later, Claimant reappeared to return to work and Mr. Law informed him that he could not because he quit. (Tr. 141).

Mr. Law opined that many of the pilings Claimant moved originally were set in the water, however, he stated at trial that none of the pilings Claimant placed in the dumpster were laying in the water. (Tr. 143;

CX 11, p. 16). Some of the pilings Claimant removed had barnacles on them and were rotten. (CX 11, p. 29). Mr. Law stated that the job of removing the pilings lasted nearly two weeks, but Claimant had some interceding duties welding. (TR. 144; CX 11, p. 18).

C(3) Testimony of Therrell Glenn Boller

In 1998, Mr. Boller was employed as the safety director at Employer's facility, and had worked for Employer, or its parent company, since 1970, quitting in April 2000. (Tr. 158, 166). Mr. Boller's job entailed making sure OSHA rules were abided by, following through with safety meetings, handling workers' compensation, first-aid, and the overall safety inspections of the facility. (Tr. 159). Claimant presented to Mr. Boller on Monday morning, the day after his accident. (Tr. 159-60).

Mr. Boller testified that Claimant was assigned light duty work performing clean-up in the shop area pursuant to Dr. Doster's restrictions and that Claimant never returned to full duty work without restrictions. (Tr. 160). When Claimant re-injured his back stepping down from a fork-lift, he went to Mr. Boller's office. Mr. Boller testified that he requested that Claimant see a doctor but Claimant refused saying that he just wanted to go home. (Tr. 161). Mr. Boller kept a record of everyone who came to the first-aid office and on the day of injury Mr. Boller had indicated that Claimant quit. (Tr. 162). A week later, Claimant showed up at the facility with Dr. Doster's light duty work restrictions but was told there was no job for him since he had quit. (Tr. 163). Claimant picked his tools up the same day. (Tr. 163).

C(4) Testimony of Charles G. Miller

Mr. Miller, a vocational rehabilitation consultant for Crawford & Company, was asked to perform a vocational evaluation on Claimant but was unable to because Claimant's counsel refused to let Mr. Miller meet with the Claimant. (Tr. 168, 171-72). Claimant's counsel refused because it was his position that Claimant had not yet reached maximum medical improvement, thus, a vocational assessment was inappropriate. (Tr. 189). Nonetheless, in November 2001, Mr. Miller performed a hypothetical evaluation based on the medical records of Drs. McCloskey, Doster, Connolly, and Smith, as well as the deposition of Claimant. (Tr. 172-73). Because Mr. Miller could not meet with Claimant. no educational testing was performed. (Tr. 174).

Based solely off a review of the record, and making inferences from that record, Mr. Miller opined that Claimant had the ability to work at the sedentary to light exertion level with limited bending and standing. (Tr. 178). Specifically, Claimant could work as a casino security officer, forklift operator, overhead crane operator, dispatcher and pest control technician. (Tr. 178). The pay scale for these positions ranged from eight to ten dollars an hour. (Tr. 178). Subsequently, Mr. Miller performed a job market survey based on Claimant's restriction in the local job market. (Tr. 178). Positions available within a fifty to sixty mile radius included two inventory positions, a bus driver position, a warehouse worker, a septic tank vacuum operator, and a warehouse supervisor, all in Mobile, Alabama. Mr. Miller identified one job in Gulfport, Mississippi as an equipment operator for a temporary employment service. (Tr. 179, EX 11).

Of the jobs Mr. Miller identified in his labor market survey, dated January 8, 2002, the only job likely to have been available on March 8, 1998, was an inventory position with RIGS in Mobile, Alabama, but he did not know what the job paid at that date. (Tr. 182). Mr. Miller never asked the treating physicians

whether they approved the jobs that he identified. (Tr. 182-83). Also, in Claimant's Social Security case, Mr. Miller had testified that Claimant had "no transferable skills to sedentary work. (Tr. 185-86; CX 23, p. 3). Nonetheless, Mr. Miller's prior testimony in the Social Security case did not change his opinion in the Longshore case because he stated that the determination in the Social Security case was made on the spot while the determination in the Longshore case was made after research and careful consideration. (Tr. 187-188).

D. Exhibits

D(1) Deposition of Frank Marshall Thomas, Jr.

On November 12, 2001 Claimant noticed the deposition of Mr. Thomas, a maintenance mechanic who worked for Employer for four and one-half years. (CX 9, p.1, 4). Mr. Thomas was a co-worker of Claimant, on the same crew and under the supervision of Clay Law, and had heard from other people he worked with that Claimant had fallen from a ladder and gotten hurt. *Id*. at 5. Claimant and Mr. Thomas worked together in the phosphoric acid plant at the south end of the plant behind the diammonium phosphate storage area. *Id*. at 6.

Claimant and Mr. Thomas were assigned the task of removing wooden pilings and placing them in a trash dumpster. (CX 9, p. 6). Mr. Thomas related that the pilings were on the ground and that they did not have any part in removing them from the water. *Id*. at 7. Specifically, Claimant operated a cherry-picker to move the clamp to a piling, where Mr. Thomas would attach it. Claimant would then lift the piling into a dumpster, and Mr. Thomas would then release the clamp. *Id*. at 18. Mr. Thomas estimated that the job took less than a couple of weeks to complete. *Id*. at 21.

Employer did, however, have piers and docks along the waterway capable of accommodating ships and barges, but Mr. Thomas related that neither he nor Claimant worked in those areas. (CX 9, p. 9-10). At the docks, vessels would enter from the Gulf, unload rocks and ammonia and load the manufactured fertilizer. *Id*. at 10.

Mr. Thomas could not recall if he was a permanent employee or still temporary help. (CX 9, p. 12). The crew that he worked in was called temporary maintenance, an assignment that was temporary until an individual was moved somewhere else. *Id*.

D(2) Deposition of Carl Budinich

Claimant noticed the deposition of Carl Budinich, Jr. on November 12, 2001. (CX 10, p. 1). Mr. Budinich was the technical manager for Employer, a job that entailed engineering, maintenance functions, and interface with outside contractors. *Id*. at 3-4. Mr. Budinich stated that Claimant quit his job in March 1998, but had he not quit, Claimant would have been eligible for a permanent position. *Id*. at 7. About two weeks after Claimant had "quit," Mr. Budinich related that a conversation took place between himself, Clay Law, and Claimant. *Id*. at 15. Mr. Budinich and Mr. Law told Claimant that he no longer had a job because he had quit. *Id*.

Mr. Budinich also stated that Employer used the dock area for unloading phosphate rock, sulfuric acid, ammonia and on rare occasions, sulphur. (CX 10, p. 15). Mr. Budinich estimated that the pilings Claimant picked up were between fifty and seventy-five feet from the water. *Id*.

D(3) Medical Records of Dr. Vernon Doster

At a pre-employment physical examination, dated January 26, 1998, Claimant indicated that he had prior trouble with his skull, biceps, fingers and knee. (CX 15, p. 23). Claimant explained these statement by indicating that he was in a car wreck in 1972 requiring 180 stitches; in 1967 he cut his left index finger; and in 1955 he broke his left arm. *Id*. Claimant was also taking medication for gout. *Id*.

On March 11, 1998, Claimant presented to Employer's physician, Dr. Doster, complaining of left leg, cervical and lumbar pain as well as chemical inhalation after he fell climbing a wooden ladder "injuring the mid portion of he lower portion of his left leg, hitting his back, popping his neck and twisting the lower portion of his back." (EX 15, p. 12, 14). Since having his injury on March 8, 1998, Claimant reported soreness in his head and shoulders as well as in his neck and lower lumbar region. *Id*. at 12. Dr. Doster ordered x-rays which revealed anterior osteophytes involving the lower cervical vertebral bodies and lower lumbar vertebrae. *Id*. at 16. Dr. Doster's impression was that Claimant had "[c]ervical and lumbar strain, contusion of the left leg and bilateral shoulder and hi[p] strain, history of toxic chemical inhalation and bronchitis." *Id*. at 12. Dr. Doster limited Claimant to light duty work until the pain resolved, specifically limiting Claimant to no bending, climbing, prolonged standing, and no lifting greater than twenty pounds. *Id*. at 15.

On April 4, 1998, Claimant returned, after he resumed full duties at work and had a recurrence of pain in the lower back and upper portion of the right buttock, after lifting a heavy object on March 31, 1998. (CX 15, p. 12). More x-rays were suggestive of spondylolisis at L5-S1 and large anterior osteophytes at L3, L4, and L5. *Id*. at 9, 12 Dr. Doster's new impression was that Claimant had [l]umbar back pain, spondylolisis, probable degenerative disc disease and osteoarthritis." *Id*. at 12. Dr. Doster recommended that Claimant not return to work. *Id*. at 8.

On April 8, 1998, Claimant returned to Dr. Doster for a check-up. (CX 15, p. 6). Claimant reported that his back pain was better and Dr. Doster decided to return him to light duty work with no lifting over twenty pounds because of his improved lumbar back pain and spondylolisis. *Id*. On April 15, 1998, however, Claimant complained to Dr. Doster of continued problems with his lower back and a physical examination revealed a pulling sensation in the left hip during straight leg raises. *Id*. Dr. Doster opined that Claimant may have degenerative joint disease and a possible disc disorder. *Id*. Claimant's light duty work restrictions continued with the exception that Dr. Doster did not want Claimant lifting anything greater than fifteen pounds. *Id*. at 3.

On April 22, 1998, Claimant appeared for a pre-scheduled appointment to have an MRI, but Claimant was too large for the machine. (CX 15, p. 2). Accordingly, a CT scan was arranged, but there was some limitation to the imaging due to Claimant's obesity. *Id*. Nonetheless, imaging revealed mild spurring extending out from the edges but no disc herniation. *Id*. The L5 disc had a "prominent vacuum phenomenon with prominent spurring extending out from its articular edges." *Id*. Claimant also had "bilateral spondylolisis producing grade II spondylolisthesis," but no disc herniation or spinal stenosis was present. *Id*. After obtaining these results, Dr. Doster referred Claimant to Dr. McCloskey for a lumbar evaluation and continued

Claimant's work restriction indefinitely. *Id*. at 1.

D(4) Medical Records of Dr. McCloskey

On May 12, 1998, Claimant began treatment with Dr. McCloskey complaining of deep pain the small of his back, knife like pain on twisting, bending, leaning, and walking, kidney area pain, and radiating leg pains that made him "absolutely sick." (CX 12, p. 137). Claimant also related that he was unable to work for the past 3-4 weeks and that he re-injured his back twice after returning to light duty. *Id*.

On May 27, 1998, Dr. McCloskey noted that Claimant was 5'11" and weighed 275 pounds. (CX 12, p. 130). Based on Claimant's physical exam and past history, Dr. McCloskey opined that Claimant was suffering from a suspected symptomatic spondylolisthesis at L5, recent low back injury, massive obesity, hypertension, multiple level degenerative disc disease of the lumbar spine, gout and noted that Claimant was on aspirin prophylaxis. *Id*. at 131. Dr. McCloskey further commented that the complaints seemed *bona fide* and that Clamant had a disc bulge and spinal stenosis at L4. *Id*.

An x-ray report, dated June 8, 1998, revealed that Claimant had grade II spondylolisthesis at L5-S1; ventral defects at L2-3 and L3-4; and relative spinal stenosis at those levels. (CX 12, p. 126). Although there was no evidence of disc herniation, the spinal canal was congenitally small particularly at L2-3. *Id*. An ultrasound of the abdomen produced a small non-obstructing left renal calculus (kidney stone) but was otherwise unremarkable considering Clamant's size. *Id*. at 125.

By June 30, 1998, Dr. McCloskey noted Claimant continued to struggle with low back pain, bilateral leg pain, and troubles with his shoulders. (CX 12, p. 114). After reviewing Claimant's diagnostic studies, Dr. McCloskey related to Claimant that he had "a hurt problem and not a harm problem and he [did] not have to have surgery." *Id*. No surgical procedure would enable Claimant to return to heavy or strenuous work. *Id*. Claimant asked for a referral to Dr. Connolly at the Ochsner Clinic and while Claimant was waiting to see Dr. Connolly, Dr. McCloskey sent Claimant to physical therapy at the George County Hospital. *Id*. at 115.

On July 15, 1998, Claimant began his physical therapy program. (CX 12, p. 106). Physical therapist Curt Walker noted Claimant had 60-70% trunk extension with severe pain noted, and bilateral rotation of 50%. *Id*. By August 8, 1998, physical therapy had decreased Claimant's overall pain and tightness. *Id*. at 97. On August 28, 1998, after fifteen sessions, Claimant still had some pain in his back and shoulders but his overall pain level continued to decrease. *Id*. at 89. Claimant's treatment plan was to decrease his treatment modalities and increase his exercises. *Id*.

On August 6, 1998, Lynn Alexander, a medical services consultant for Crawford and Company Care Management Services, wrote to Dr. McCloskey in light of Dr. Connolly's opinion that Claimant's impairments were pre-existing, to ask Dr. McCloskey to determined the extent of Claimant's work-place injury, residual impairments, and a date for maximum medical improvement. (CX 12, p. 98).

On August 29, 1998, Dr. McCloskey noted that surgery would be futile unless Claimant lost about one-hundred pounds and that the only time Claimant felt comfortable was when he could adjust his prescribed hospital bed. (CX 12, p. 85). Claimant reported to Dr. McCloskey that physical therapy was of little benefit.

Id. Dr. McCloskey's new impression was that Claimant continued to suffer from very symptomatic grade II spondylolisthesis, morbid obesity and high blood pressure. *Id*. Claimant's main objective was to lose one-hundred pounds under a medically supervised aggressive program. *Id*.

On September 9, 1998, Dr. McCloskey responded to Lynn Alexander stating that Claimant's obesity and spondylolisthesis were pre-existing but that Claimant was not incapacitated until his work-place injury permanently aggravated his previously asymptomatic problem. (CX 12, p. 82). In regards to his injury, Dr. McCloskey assigned a ten percent permanent partial physical impairment to the whole body and limited Claimant to sedentary work. *Id*. Dr. McCloskey opined, however, that Claimant continued to need medical treatment and may end up having to undergo surgery. *Id*.

Crawford & Company approved a two month trial weight loss program on November 11, 1998, after which it wanted to review the results to determine if further authorization was warranted. (CX 12, p. 62). By May 19, 1999, however, Lynn Alexander wrote to Dr. McCloskey that the weight loss program was not producing any results for Claimant and asked Dr. McCloskey to determined Claimant's present status, work restrictions, and whether he was at maximum medical improvement. *Id*. at 42.

On June 30, 1999, Dr. McCloskey noted that Claimant was having difficulty driving a car for long distances and that Claimant felt totally incapacitated. (CX 12, p. 25). Claimant's weight was 302 pounds and Dr. McCloskey conceded that the weight loss program was a failure for Claimant. *Id*. A new set of x-rays, taken July 8, 1999, reconfirmed grade II spondylolisthesis of L5-S1 and L5-S1 disc disease with degenerative changes. *Id*. at 24. An MRI of the lumbar spine taken on the same date, however, revealed bilateral spondylolisis with a grade I spondylolisthesis at L5-S1 with the anterior listheiss of L5-S1 producing a severe bilateral forminal stenosis. The MRI also revealed a moderate sized central L5-S1 disc herniation contributing to mild stenosis and a broad based central protrusion at L3-4 producing mild stenosis. *Id*. at 23. After reviewing and comparing the results with earlier diagnostic studies, Dr. McCloskey opined that Claimant's condition remained unchanged, and recommended against surgery despite Claimant's continued pain. *Id*. at 20. Because Claimant was a year post-injury, Dr. McCloskey opined that Claimant had reached maximum medical improvement and was limited on what he could do on a permanent basis. *Id*.

On October 11, 1999, Claimant presented for a return visit complaining of continued back pain, popping, heaviness in his legs, as well as shoulder and neck troubles. (CX 12, p. 11). Dr. McCloskey noted that Claimant was recently diagnosed as diabetic, and had a shortness of breath from burned lungs. *Id*. Dr. McCloskey's impression was that Claimant had post-traumatic low back syndrome secondary to spondylolisthesis at L5 and spinal stenosis, multiple level degenerative disc disease of the lumbar spine, arthritis in neck and shoulders, massive obesity, hypertension, and non-insulin dependent diabetes mellitus. *Id*. Dr. McCloskey assigned a fifteen percent permanent partial impairment to the whole body as a result of his back injury and opined that Claimant was permanently limited to sedentary or very light type work. *Id*. at 12. Although he ordered x-rays for Claimant's neck and shoulders, Dr. McCloskey stated that he had no plans for surgery and advised Claimant on obtaining Social Security Disability. *Id*.

On February 28, 2000, Claimant weight increased to 315 pounds, and he continued to struggle with neck an bilateral shoulder pains, headaches, low back pain, and numbness and tingling in the forearms and hands. (CX 12, p. 7). New impressions were that Claimant had a mass on the right posterior neck which Dr. McCloskey suspected was lipoma and Dr. McCloskey also suspected Claimant had carpal tunnel syndrome. *Id*. at 8. Dr. McCloskey clearly related Claimant's neck and shoulder complaints to his work-

place injury. *Id*.

After reviewing new x-rays of Claimants neck shoulders and back, Dr. McCloskey remarked on March 15, 2000, that the right shoulder showed some mild degenerative changes, there was some arthritis and degenerative changes in the neck and a small disc herniation at C4-5 that may be responsible for some of Claimant's difficulty. (CX 12, p. 5). On April 25, 2000, Claimant presented with severe right shoulder pain such that he could not move his right shoulder. *Id*. at 1. Claimant also had continuing problems with his back, neck, and legs. *Id*. Dr. McCloskey new impression was that Claimant suffered from a frozen shoulder and herniated necleus pulposus at C4-5. Dr. McCloskey opined that the frozen shoulder was a result of his neck injury and disc herniation and referred Claimant to Dr. Wiggins for treatment of that problem. *Id*. at 2. In regard to the neck and shoulder injuries, Dr. McCloskey stated that he reached maximum medical improvement and had a 5% permanent partial impairment to his body as a whole, which combined with a 15% impairment to the body as a whole due to his lumbar condition, created a 20% total permanent partial physical impairment. *Id*.

D(5) Medical Records of Dr. Edward S. Connolly (Ochsner Clinic)

On July 22, 1998, Claimant underwent a neurosurgical consultation with Dr. Connolly regarding a possible need for a lumbar fusion because of spondylolisthesis. (CX 13, p. 1). Claimant appeared in no acute distress, and Dr. Connolly noted that Claimant's spondylolisthesis had been present for a long time. *Id*. Dr. Connolly opined that unless Claimant "had nerve root signs or evidence of a progressive slip . . . he [was not] a candidate for lumbar fusion." *Id*. Dr. Connolly further stated that "[i]f he did show signs of a radicular compression or progressive slip, then he would need to lose about 75 pounds before he would really be a satisfactory candidate to undergo a spinal fusion." *Id*.

D(6) Medical Records of Dr. Terry Smith

On September 22, 1998, Claimant underwent an "independent medical examination" with Dr. Terry Smith, a specialist in spinal and neurological surgery, who noted that Claimant weighed 300 pounds. (CX 12, p. 79). Dr. Smith agreed with Dr. McCloskey's diagnosis and opined that Claimant's spondylolisthesis at L5-S1 exerts a traction on the L5 nerve root laterally which would create neurogenic claudication type pain. *Id*. at 80. Dr. Smith recommended surgical decompression and fusion after Claimant lost weight. *Id*.

D(7) Medical Records of Digestive Health Center

On December 15, 1998, weight loss technicians at Digestive Health Center instructed Claimant and provided him a copy of a 1200 calorie weight reduction diet plan complete with a physical activity program. (CX 14, p. 6). The ultimate goal was to reduce Claimant's weight from 309 pounds to 190 pounds. *Id*. On January 26, 1999, Claimant had lost four pounds, voiced complaints with the 1200 calorie plan and succeeded in increasing his planed caloric intake to 1500 per day. *Id*. On February 9, 1999, Claimant maintained his weight at 305 pounds, but by March 2, 1999, he had increased in weight to 318 pounds. *Id*. at 3. On March 29, 1999, Claimant weighed 302 pounds and the weight loss technician noted that Claimant was eating too many easy convenience foods. *Id*. at 2. By May 4, 1999, Claimant had not lost any significant weight and had actually increased seven pounds since his last visit. *Id*. at 1.

D(8) Medical Records of Dr. Y. C. Joe Chen

Dr. Chen examined Claimant on May 15, 2000, at Sun Coast Pain Management Center in relation to Claimant's complaints of low back , neck and shoulder pain. (EX 19, p. 12). Claimant reported his current pain score was 4-5 out of ten and that bowel movements, bright lights, cold, dampness, fatigue, loud noise, movement, physical activity, pressure, sneezing, coughing, standing, tension and whether changes increased his pain. *Id*. Dr. Chen's assessment was lumbar spondylolisis, lumbar disc disease, cervical spondylolisis, cervical disc disease, right shoulder pain, and cervical radiculopathy down the right side. *Id*. at 13. Dr. Chen's plan was to undertake medial branch blocks for consideration of future radio-frequency ablation, and evaluate Claimant for chronic narcotic therapy. *Id*.

On May 24, 2000, Dr. Chen also assessed myofascial pain and administered the medial branch blocks. (CX 19, p. 11). On June 21, 2000, Claimant reported excellent pain relief and underwent additional medial branch blocks. *Id*. at 9. On September 8, 2000, Claimant underwent radio-frequency lesioning at L4-5 and L5-S1 facet joints. *Id*. at 7. On September 21, 2000, Claimant reported that his pain was reduced by fifty percent. *Id*. at 6. On November 27, 2000, Claimant rated his pain level as a 4-5 out of ten, and on January 8, 2001, Claimant reiterated that he had persistent pain in his sacral area leading Dr. Chen to assess possible sacroiliac joint pain. *Id*. at 3-5. On January 18, 2001, Claimant received a caudal epidural steroid injection, and when Claimant's pain increased, Dr. Chen terminated Claimant's injection therapy and referred Claimant back to Dr. McCloskey. *Id*. at 1-2.

D(9) Medical Records of Dr. Chris Wiggins

On May 23, 2000, Dr. Wiggins treated Claimant for frozen shoulder syndrome on a referral from Dr. McCloskey. (CX 17, p. 7). Dr. Wiggins reviewed x-rays of Claimant's right shoulder and opined that they were normal. *Id*. at 8. Claimant related that Dr. McCloskey had released him to return to work, but Dr. Wiggins revoked that return to work status and stated that it was unlikely he would return to work at all. *Id*. at 7. On June 20, 2000, Dr. Wiggins continued his recommendation that Claimant stay off of work, scheduled a right shoulder arthrogram and requested a second reading of a scheduled MRI of Claimant's shoulder. *Id*. at 6.

On June 23, 2000, a right shoulder arthrogram of Claimant's shoulder indicated that he had a rotator cuff tear and moderate degenerative disease with spurring on the articular edges. (EX 17, p. 5). Dr. Wiggins interpreted an MRI taken on June 14, 2000, as showing supraspinatus tendon with fraying which exemplified either tendinitis or a full thickness tear, and minimal osteoarthritis of the shoulder. *Id*. at 2. On June 27, 2000, Dr. Wiggins diagnosed a torn right rotator cuff and advised Claimant on surgery and rotator cuff repair. *Id*. at 1. Claimant insisted on a micro-surgical approach, and Dr. Wiggins referred Claimant to Dr. Savoie. *Id*. Dr. Wiggins further stated that a twenty percent permanent partial disability to the right upper extremity was appropriate for Claimant based on his condition. *Id*.

D(10) Medical Records fo Dr. F. H. Savoie

Dr. Savoie, of the Mississippi Sports Medicine & Orthopaedic Center, first treated Claimant on August 16, 2000, due to complaints of right shoulder pain at night and decreased range of motion. (CX 16, p. 2). An x-ray revealed a significant degenerative joint disease with a large inferior humeral spur leading

Dr. Savoie to opine that Claimant had glenohumeral degenerative joint disease. *Id*. After some injections and physical therapy, Dr. Savoie noted on September 6, 2000, that Claimant was not any better. Dr. Savoie told Claimant that his option was to live with the pain, (which ranged between 5 and 8 on a ten point scale), or undergo "arthroscopic debridement with cuff repair, decompression and Mumford, major chondroplasty of the glenohumeral arthritis or do shoulder replacement with rotator cuff repair." (CX 16, p. 1). Of the available options, Claimant selected "arthroscopic clean out [with] . . . laser chondroplasty, decompression, Mumford and cuff repair." *Id*. On December 4, 2000, Dr. Savoie performed surgery to repair Claimant's shoulder. (Tr. 55). Dr. Savoie discussed performing another operation on Claimant for a complete shoulder replacement. (Tr. 60).

D(11) Medical Records of Dr. Donald Sawyer

On April 12, 2001, Dr. Sawyer, a urologist, examined Claimant on the referral of Dr. Chen for urinary incontinence due to his work-place injury. (CX 18, p. 8). Claimant reported the he urinated every hour during the day -four or five times at night - and had fecal incontinence. *Id*. at 4. Dr. Sawyer's initial impression was that Claimant had urinary incontinence and urge incontinence of unclear etiology but opined that it was likely due to a neurogenic bladder as a result of his back injury. *Id*. at 3. Dr. Sawyer also thought Claimant had benign prostatic hypertrophy, fecal incontinence, hypertension, DM type II asbestosis, Asthma with possible COPD, ASCVD with angina, SP surgery on right shoulder, SP excision of skin cancers, recurrent pneumonia, erectile dysfunction which may either be vascular or neruogenic. *Id*. A pelvic ultrasound, performed on April 24, 2001, showed a somewhat misshapen urinary bladder extending superiorly out of the pelvis. *Id*. at 6. An abdomen ultrasound, performed on May 4, 2001, mild bilateral nephromegaly and hepatomegaly. *Id*. at 5. On September 12, 2001, Dr. Sawyer referred Claimant to Dr. Selman for further evaluation and possible surgery. *Id*. at 1-2.

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that he was assigned tasks that were indisputable maritime activities covered by the Act. Similarly, Claimant argues that he was in a covered situs because Employer's facility is located beside the navigable waters and the situs was customarily used for maritime activity. Claimant also argues that he has not achieved maximum medical improvement because Dr. Savoie recommends shoulder reconstruction surgery, Dr. McCloskey recommends continued chronic pain treatment and Employer has not authorized the testing ordered by Dr. Sawyer. Additionally, even if this Court determines that Claimant has reached maximum medical improvement, Claimant contends that he established a *prima facie* case of total disability because his former job is no longer available and Employer failed to show suitable alternative employment. Alternatively, if suitable alternative employment was shown, then Claimant asserts that he is entitled to cost of living adjustments from the date of maximum medical improvement to the date Employer established suitable alternative employment. Under Section 10(c), Claimant argues that his average weekly wage is $829.05, with a corresponding compensation rate of $552.70, based off of the thirty-seven days from Claimant's date of hire to the date of his accident. Furthermore, Claimant contends that he established his right to medical benefits, statutory penalties, and interests.

Employer alleges that Claimant's injury did not occur on a covered situs under the Act because the area of the plant where Claimant was injured was geographically and functionally distinct from the dock or waterfront area. Assuming that Claimant is able to pass the situs test, Employer argues that Claimant fails to meet the status test because Clamant's only connection to maritime activity was momentary and episodic work operating a cherry-picker to pick up pilings from an old dock, and was not expected to do any loading, unloading, repair, maintenance or work on a regular basis around the dock area. Alternatively, Employer asserts that Claimant is not permanently disabled because he was released to perform light-duty work by Drs. Savoie and McCloskey. Employer contends that Claimant has not made a diligent search for alternative employment and that it showed suitable alternative employment through the vocational assessment of Gil Miller. Employer calculated Claimant's average weekly wage at $489.00 per week. Finally, Employer argues that it is entitled to a credit for any benefits awarded under Section 3(e) for benefits Claimant received from the State compensation system.

B. Status

Claimant can satisfy the status requirement if his work as a "B" Mechanic for Employer constitutes "maritime employment." Section 2(3) of the Act provides that a covered "employee" is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, . . ." 33 U.S.C. § 902(3) (2000). Alternatively, Claimant can attain status as established by *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977), and *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), if he spends at least "some portion" of his time performing indisputably longshoring activities. The fact that the employee was not performing maritime work at the "moment of injury" is irrelevant to a determination of maritime status. *Ferguson v. Southern States Cooperative*, 27 BRBS 17, n.4 (1993). The "moment of injury" test is one met to expand coverage to those who might not otherwise be covered. *McGoey v. Chiquita Brands International*, 30 BRBS 237, 239 (1997). The Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 92, 98 L. Ed. 5 (1953). In determining whether the time Claimant spent removing wooden pilings from the water's edge is sufficient to establish coverage under the Act, a review of the jurisprudence is instructive.

B(1) More Than Transient, Fortuitous, Fleeting, or Episodic

In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 908 (5th Cir. 1999) the Fifth Circuit concluded that Bienvenu, a pumper specialist, who lived on a fixed platform, and who spent 8.3% of his time working onboard a vessel, was covered under the Act. Bienvenu had the use of a vessel and a skipper to transport him to various platforms where he worked. *Id.* at 903. He was injured while on navigable waters when he removed his tool box from the back of the vessel and again while tying the vessel to a dock. *Id.* At a formal hearing the ALJ determined that Bienvenu was not covered because the vast majority of his work took place on a fixed platform and was only fortuitously on navigable waters when injured. *Id.* Because Bienvenu was injured while performing his duties on the navigable waters, the Fifth Circuit reasoned that he need not establish that he was engaged in maritime employment under Section 2(3), since the Supreme Court determined that amendments to the Act did not negate coverage to those who were actually injured performing their jobs over the navigable waters. *Id.* at 907. The fact that Bienvenu was not required to perform work aboard a vessel did not change his status. *Id.* Bienvenu's presence on a vessel was more than

transient or fortuitous because 8.3% of his time was spent working onboard, and the Fifth Circuit determined that this was not an insubstantial amount of time. *Id*. at 908. The exact amount of work time necessary to establish coverage was left for case by case development. *Id*.

In the case of *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1346 (5th Cir. 1980), the Fifth Circuit concluded that the Act covered workers whose maritime employment was not substantial when compared to the overall employment activities. Boudloche, a truck driver, was periodically required to pick up or deliver oil and gas drilling equipment at a dock. *Id*. at 1347. At ten to twenty percent of the docks he visited, Boudloche was required to load and unload the equipment by himself. *Id*. Boudloche estimated that he was required to load and unload equipment two to three times per week, or 2 ½ to 5% of his overall work time. *Id*. He was injured while loading several small boats by himself. *Id*. Reasoning that Boudloche only needed to spend "some" of his time in longshoring activities to be covered, the Fifth Circuit rejected a "substantial portion" test adopted by the Board and found that Boudloche was covered under the Act. *Id*. at 1348. The court also opined that there is a point in which a "worker's employment in maritime activity becomes so momentary or episodic it will not suffice to confer status," but, that point was not reached at 2 ½ to 5% of overall employment in maritime activity. *Id*. *See also Howard v. Rebel Well Services*, 632 F.2d 1348,1350 (5th Cir. 1980)(finding 10% of time engaged in ship repair is sufficient to confer maritime status); *McGoey v. Chiquita Brans International*, 30 BRBS 237, 239 (1997)(finding 3-5% of time spent supervising unloading of ships in the regular course of business was sufficient to confer status); *Ferguson v. Southern states Cooperative*, 27 BRBS 17, 20 (1993)(finding 2% of regularly assigned duties is not episodic or irregular and is sufficient to confer status).

In the case of *Sea-Land Service, Inc., v. Rock*, 953 F.2d 56, 67 (3rd Cir. 1992), the Third Circuit determined that a courtesy van driver, who sometimes transported longshoremen within a two-hundred acre loading and unloading terminal, was not covered under the Act finding that such activity was not essential to the loading and unloading process. The parties stipulated that situs was proper, and the Board determined that Rock was covered under status because his job required him to transport various maritime personnel, custom officials, and customers, thus he was "essential to maritime industry and further[ed] the concerns of a covered employer." *Id*. 58-59. Acknowledging that Rock's activities had a slight connection to the unloading process in that he furthered security concerns in relation to valuable cargo, the court reasoned that Rock was not covered because the path of cargo from storage to ship would be completely unaffected by the termination of Rock's employment. *Id*. at 65-67. He simply played no part in the chain of events that conferred maritime status under Section 2(3). *Id*. at 67.

(B)(2) Indisputably Maritime Activities

A claimant can attain maritime status if he spends at least "some portion" of his time performing indisputably longshoring activities. *Boudloche*, 632 F.2d at 1348. *See also Fleischmann v. Director, OWCP*, 137 F.3d 131, 137 (2nd cir. 1998)(determining that a construction worker who built bulkheads, piers and floating docks was a covered harbor worker because those structures had a connection to ships); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, n.3 (1st Cir. 1980)(refurbishing a dockside gantry and repairing a conveyor used to load ships); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1339 (9th Cir. 1982)(holding that a pile driver involved in the construction and repair of piers was a harbor worker and thus covered under the Act); *Olson v. Healy Tibbitts Construction Co.*, 22 BRBS 221, 224 (1989)(finding a worker engaged in repairing a breakwater, whose duties included driving piling, loading

and unloading barges, and light maintenance, to be covered as a harbor worker); *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978) (holding that "those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharfs, adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed harbor workers.").

In *Herbs Welding, Inc., v. Gray*, 470 U.S. 414, 427, 105 S. Ct. 1421, 1428-9, 84 L. Ed. 2d 406 (1985), the Supreme Court denied coverage under the Act to a welder working on a fixed platform who was only transiently over the water and injured on the platform. The Court noted a "substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." 470 U.S. at 427 n.13. More was required to be a maritime worker than just loading and unloading ones personal tools from a vessel. *Id.* at 425-26. Gray was not employed in the maintenance of equipment used for loading and unloading, and his job of maintaining and building pipelines was not altered by the maritime environment. *Id*. at 427.

In *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 1012-13 (9th Cir. 1999), the Ninth Circuit determined that a construction worker on a pier did not meet the maritime status requirement to confer jurisdiction under the Act. The construction worker, Hurston, was injured while working as a pile driver on a structure that resembled a pier but was not used to dock ships and only touched the water at high tide. *Id*. at 1009-10. The structure was used for separating water and gas and for storing oil. *Id*. at 1010. Once every five or ten days oil was pumped from the structure onto a barge. *Id*. By a previous decision, the Ninth Circuit determine that the situs requirement was satisfied, and on remand, the ALJ and the Board determined that status was met "at least where the spray from the ocean made the pier slippery and the waves affected the way the pile driving was done." *Id*. The Ninth Circuit denied status, reasoning that Hurston's "engagement was for pile-driving, which was pier construction, not ship construction." *Id*. at 1012. Furthermore, the case was distinguishable from prior Board decisions determining that construction workers on pier were covered because the Board's prior cases concerned construction on piers that were used to accommodate ships, and the Board had denied status to construction workers where the piers were not used to accommodate ships. *Id*. at 1013, citing, *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978); *Rhodes v. Healy Tibbits Construction Co.*, 9 BRBS 605, 609 (1979); *Laspragata v. Warren George Inc.*, 21 BRBS 132, 135 (1988). "Hurston was not working on a pier used to accommodate ships, nor [did] the record establish that he was working in a harbor, which is a place for ships." *McGray*, 181 F.3d at 1013. The fact that Hurston was near the sea was only relevant to situs and not status. *Id*.

In *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298, 302 (1994), the Board upheld a decision by the ALJ that a claimant failed to satisfy the status requirement by constructing concrete piles on top of wooden pilings in a bridge construction project. The Board determined that the bulkhead work for the bridge was already completed, the bridge was too low to aid in navigation and there was no evidence that the claimant's activity helped in the loading, unloading, building or repairing of a vessel. *Id*. at 303.

In the instant case, Claimant spent sixty-two days as an employee, of which about least two weeks was spent in the removal of wooden pilings from the water's edge. Removal of these pilings were part of Claimant's "regularly" assigned duties and, based on the short period of Claimant's overall employment, the time Claimant spent on these duties was more than transient, fleeting, fortuitous or episodic.

In as much as the Board or circuit courts have determined that those persons directly engaged in the construction, maintenance and repair of harbor facilities meet the status requirement, these decisions must

be viewed in light of *Gray*, which requires some direct connection to the loading, unloading, repairing or construction of a vessel. In any event, the instant case is distinguishable from those decisions finding that a construction workers have status because in this case Claimant was involved in the removal of what was once thought to be a pier and not in its construction. Here, hundreds of wooden pilings were stacked on land and the stack of pilings extended into the water. Claimant was not involved in the deconstruction of a pier, but only in the removal of wooden pilings that had already been uprooted. As such, any connection to navigation or maritime activity is tenuous. Like *Gray*, Claimant's activities in disposing of stacked wooden pilings is a "land based" job. Also, like *McGray*, the pilings Claimant was removing had no connection to the accommodation of ships. Like *Pulkoski*, there was no evidence that Claimant's activities helped in the loading, unloading, building or repairing of a vessel. Likewise, Claimant failed to show at trial how repair of a water pipe, running along the water's edge had anything to do with maritime activities. No evidence suggested that the water running through the pipe was pumped onto the ships, or that Claimant was performing the duties of a "harbor worker." In this case Claimant was merely working by the water's edge, and while the water's edge may be a proper situs, that cannot also confer a maritime status after the 1972 amendments to the Act.[2] Therefore, I find it appropriate to DENY benefits under the Act because Claimant does not meet the status requirement necessary to confer jurisdiction under the Act.

Nevertheless, should the Board determine that the status requirement was fulfilled, I shall decide the remaining issues in this case.

V. ALTERNATIVE FINDINGS

A. Status Continued - The Moment of Injury

In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed.2d 320 (1977), the Supreme Court rejected a moment of injury test for the purpose of excluding an employee from coverage. The Court reasoned that when Congress said it wanted to cover longshoremen after the 1972 amendments to the Act, it "had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations, and who, without the 1972 amendments would be covered for only part of their activity. *Id*. at 273. *See also P.C. Pfeiffer Co., Inc., v. Ford*, 444 U.S. 69, 100 S. Ct. 328, 62 L. Ed. 2d 225 (1979)(determining that a worker fastening vehicles on a railroad car and another unloading cotton into a pier warehouse were maritime employees, rejecting a "point of rest" test for coverage). Not extending coverage to employees injured on land "conflicts with the express purpose of the Act because it allows workers to walk in and out of coverage as their work moves to different sides of the point of rest." *P.C. Pfeiffer Co., Inc.*, 444 U.S. at 76. Employees do not have to be injured while engaged in maritime activities and are covered even if at the moment of injury they are not performing work essential to the loading process. *Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278 (1989)(concurring opinion); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978). In *Schwalb*, the concurring justices, Blackmun, Marshall and O'Conner, clearly stated:

---

[2] Had Claimant been injured on a proper situs, Claimant may have been covered before the 1972 amendments to the Act and, under the case law, would likely be covered after the 1972 amendments as long as his presence there was more than fortuitous, transient or episodic. *See Bienvenu*, 164 F.3d at 907.

> In *Pfeiffer*, we said that the "crucial factor" in determining LHWCA coverage is the nature of the activity to which a worker may be assigned. . . . To suggest that a worker like Schwalb, McGlone, or Goode, who spends part of his time maintaining or repairing loading equipment, and part of his time on other tasks (even general cleanup, or repair of equipment not used for loading), is covered only if he is injured while engaged in the former kind of work, would bring back the "walking in and out of coverage" problem back with a vengeance. We said in *Northeast Marine Terminal Co.*, that to exclude [a worker] from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

Schwalb, 493 U.S. at 50.

In the instant case, Claimant was injured in the course of his duties, while working as a "B' Mechanic for Employer, welding in the phosphoric acid plant about 100-200 yards from the waters edge. Assuming that Claimant fulfilled the status requirement by removing pilings from the water's edge, I find that his maritime activities were not insubstantial in nature, thus, Claimant is entitled to coverage (assuming situs is also proper) under the Act because to find otherwise would be to resurrect the "walking in and out of coverage" problem that Congress sought to eliminate in 1972. Therefore, Claimant meets the status requirement for extending longshore coverage under Section 2 of the Act because the amount of time Claimant spent in maritime activities was not insubstantial, and the fact that Claimant was injured while not engaged in traditional maritime employment is not determinative of when coverage is extended under the Act.

B. Situs

The situs requirement is a location test whereby the place of injury is determinative for extending coverage. *Jacksonville Shipyards v. Perdue*, 530 F.2d 533 (5th Cir. 1976). In 1972, Congress extended the Act landward to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. § 903(a) (2001). The "adjoining" area need not be exclusively used for maritime activities so long as it is customarily used for a significant maritime activity. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 513 (5th Cir. 1980).

Here, Claimant fell off a ladder in the phosphoric acid plant while welding. Employer presented the testimony of Mr. Pounds to prove that the phosphoric acid plant was not an "adjoining" area sufficient to confer situs. Specifically, Mr. Pounds testified concerning the production procedure at the plant. First, raw materials are imported into the facility, mostly by way of ship, which is converted into sulfuric acid. Second, the sulfuric acid is changed into phosphoric acid and that product is then shipped to the third department that makes the diammonium phosphate fertilizer. (Tr. 107-08). The phosphoric acid is granularized, stored in a warehouse, and shipped by rail, trucks, barges and ships. (Tr. 108). The Materials Handling Department is the crew that helps to move the raw materials from the vessels, and loads the final product for shipment. (Tr. 109-110). The phosphoric acid plant itself has nothing to do with unloading the barge or with maritime activity. (Tr. 110). The phosphoric acid plant had no connection to the docks by way of a conveyor or other means. (Tr. 111). The phosphoric acid plant is geographically separate from the docks and one-hundred percent functionally independent outside of the manufactured products that flow in and out. (Tr. 111). The phosphoric acid plant actually sits on an independent grid, with separate roads for ingress and egress, and a

separate drainage system. (Tr. 111-12). Mr. Pounds further testified that the phosphoric acid plant was about 100 feet from Bayou Cassat, a navigable waterway, and that the phosphoric acid plant was about one-hundred yards from the potash slip where Claimant was removing wooden pilings. (Tr. 119).

In the case of *Jones v. Aluminum Co. of America*, 35 BRBS 37, 43 (2001), the Board determined that the manufacturing part of a facility that made aluminum oxide could be separated form that part of the facility that received and shipped goods from the navigable waters of Mobile, Alabama. The claimant, Jones, alleged that he was exposed to asbestos at the employer's facility and established that some of his regularly assigned duties involved working on the conveyor system that moved raw materials into the plant from the docks. *Id*. at 38. Following the Fifth's Circuit's decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515 (5th Cir. 1980), the Board stated that the "'function' of an adjoining area must be one that is used for the loading, unloading, repairing or building of vessels." *Jones*, 35 BRBS 43. The manufacturing part of the facility simply "lacks the functional nexus to be considered a covered area, and it cannot be brought into coverage simply because goods are shipped by water from another portion of the facility." *Id*. On the other hand, the entire area used for loading and the areas where the conveyors brought the raw material into the plant was a covered situs. *Id*. Thus, reasoning that Jones must have been exposed to an injurous stimuli on a covered situs, the Board remanded the case for a determination of whether Jones was exposed to asbestos while working at a covered location under Section 3(a). *Id*. at 44.

Here, Claimant was injured in the phosphoric acid manufacturing part of the facility, which is the second step in the manufacturing of the fertilizer. By the time the product reached the building where Claimant was injured, the raw materials that arrived by ship had already been unloaded, moved to a storage area, and moved again to the first stage of production to convert the raw materials to sulfuric acid. The portion of the facility where Claimant was injured, although geographically close to the water's edge, had no relation to customary maritime activity and was solely used in the manufacturing process. Accordingly, even if Claimant fulfilled the requirements for maritime status, he was not injured in a situs "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel" under Section 3(a).

Nevertheless, should the Board determine that Claimant was injured in a covered situs, I shall decide the remaining issues in the case.

C. Causation

C(1) Section 20 Presumption

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-

15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119.

C(1)(a) Prima Facie Case

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. Here, Claimant established that he was injured after falling from a ladder while welding at work on March 8, 1998, and again on March 31, 1998 while lifting a heavy object and stepping down from a forklift. Because there were witnesses to these events, Claimant's credibility has not been attacked, and the events are well documented in the record, I find that Claimant has established a *prima facie* case for compensation.

C(1)(b) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.3d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Here, Employer had not present any substantial evidence sufficient to rebut Claimant's *prima facie* case of causation. Employer did show that Claimant had pre-existing degenerative conditions, but no physician of record ever severed the causal link between Claimant's workplace injury and his present condition. Dr. McCloskey, Claimant's treating physician clearly stated that Claimant was not incapacitated until his workplace injury permanently aggravated his previously asymptomatic problem. (CX 12, p. 10, 82). Likewise, Dr. Sawyer, Claimant's urologist, stated that Claimant's urinary incontinence was due to injuries that Claimant suffered in his fall. (CX 18, p.8). Accordingly, the record is devoid of substantial evidence sufficient to rebut the presumption that Claimant's injuries are work-related.

D. Nature and Extent of Disability and Date of Maximum Medial Improvement

Claimant seeks continuing temporary total disability benefits from March 8, 1998, and continuing

because Claimant contends that he has not yet reached maximum medical improvement. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

D(1) Nature of Claimant's Injury

Here, Claimant sustained injuries to his back, neck, shoulder and urinary system because Claimant fell off a ladder while welding. X-rays taken by Dr. Doster on March 11, 1998, revealed anterior osteophytes involving the lower cervical vertebral bodies and lower lumbar vertebrae. (CX 15, p.16). Dr. Doster's impression was that Claimant had "[c]ervical and lumbar strain, contusion of the left leg and bilateral shoulder and hi[p] strain, history of toxic chemical inhalation and bronchitis." *Id*. at 12. More diagnostic tests undertaken by Dr. Doster on April 2, 1998 showed spondylolisis at L5-S1 and large anterior osteophytes at L3, L4, and L5. *Id*. at 9, 12. Dr. Doster's new impression was that Claimant had [l]umbar back pain, spondylolisis, probable degenerative disc disease and osteoarthritis." *Id*. at 12. On April 15, 1998, Dr. Doster opined that Claimant may have degenerative joint disease and a possible disc disorder. *Id*. On April 22, 1998, Claimant underwent a CT scan which revealed that the L5 disc had a "prominent vacuum phenomenon with prominent spurring extending out from its articular edges." *Id*. at 2. Claimant also had "bilateral spondylolisis producing grade II spondylolisthesis," but no disc herniation or spinal stenosis was present. *Id*.

On May 12, 1998, Dr. McCloskey opined that Claimant was suffering from a suspected symptomatic spondylolisthesis at L5, recent low back injury, massive obesity, hypertension, a multiple level degenerative disc disease of the lumbar spine, gout, and he noted that Claimant was on aspirin prophylaxis. (CX 12, p. 131). An x-ray report, dated June 8, 1998, confirmed grade II spondylolisthesis of L5-S1; ventral defects at L2-3 and L3-4; and relative spinal stenosis at those levels. *Id*. at 126. Although there was no evidence of disc herniation, the spinal canal was congenitally small particularly at L2-3. *Id*. An ultrasound of the abdomen produced a small non-obstructing left renal calculus (kidney stone) but was otherwise unremarkable considering Clamant's size. *Id*. at 125.

On August 29, 1998, Dr. McCloskey noted that surgery would be futile unless Claimant lost about one-hundred pounds in some sort of medically supervised weight loss program. (CX 12, p. 85). On September 9, 1998, Dr. McCloskey stated that Claimant's obesity and spondylolisthesis were pre-existing but that Claimant was not incapacitated until his work-place injury permanently aggravated his previously asymptomatic problem. *Id*. at 82. On September 22, 1998, Claimant underwent an "independent medical examination" with Dr. Terry Smith, a specialist in spinal and neurological surgery, who agreed with Dr. McCloskey's diagnosis and noted that Claimant's spondylolisthesis at L5-S1 exerts a traction on the L5 nerve root laterally which would create neurogenic claudication type pain. *Id*. at 80. Dr. Smith recommended surgical decompression and fusion after Claimant lost weight. *Id*.

On June 30, 1999, an MRI of the lumbar spine taken on the same date, however, revealed bilateral spondylolisis with a grade I spondylolisthesis at L5-S1 with the anterior listheiss of L5-S1 producing a severe bilateral forminal stenosis. (CX 12, p. 24). The MRI also revealed a moderate sized central L5-S1 disc herniation contributing to mild stenosis and a broad based central protrusion at L3-4 producing mild stenosis. *Id*. at 23. On October 11, 1999, Dr. McCloskey's impression was that Claimant had post-traumatic low back syndrome secondary to spondylolisthesis at L5 and spinal stenosis, multiple level degenerative disc disease of the lumbar spine, arthritis in neck and shoulders, massive obesity, hypertension, and non-insulin dependent diabetes mellitus. *Id*. at 11. After reviewing new x-rays of Claimants neck shoulders and back, Dr. McCloskey remarked on March 15, 2000, that the right shoulder showed some mild degenerative changes, there was some arthritis and degenerative changes in the neck and a small disc herniation at C4-5 that may be responsible for some of Claimant's difficulty. *Id*. at 5. On April 25, 2000, Dr. McCloskey's diagnosed a frozen shoulder and herniated necleus pulposus at C4-5.

On June 23, 2000, a right shoulder arthrogram of Claimant's shoulder indicated that he had a rotator cuff tear and moderate degenerative disease with spurring on the articular edges. (EX 17, p. 5). Dr. Wiggins interpreted an MRI taken on June 14, 2000, as showing a supraspinatus tendon with fraying which exemplified either tendinitis or a full thickness tear, and minimal osteoarthritis fo the shoulder. *Id*. at 2. On June 27, 2000, Dr. Wiggins diagnosed a torn right rotator cuff and advised Claimant on surgery and rotator cuff repair. *Id*. at 1. An August 16, 2000 x-ray read by Dr. Savoie, revealed a significant degenerative joint disease with a large inferior humeral spur leading Dr. Savoie to opine that Claimant had glenohumeral degenerative joint disease. (CX 16, p. 2). To treat the problem, Claimant elected for surgery entailing "arthroscopic clean out [with] . . . laser chondroplasty, decompression, Mumford and cuff repair." *Id*. On December 4, 2000, Dr. Savoie performed surgery to repair Claimant's shoulder. (Tr. 55). Dr. Savoie discussed performing another operation on Claimant for a complete shoulder replacement. (Tr. 60).

On April 12, 2001, Dr. Sawyer, a urologist, examined Claimant due to complaints of urination every hour during the day -four or five times at night - and fecal incontinence. (CX 18, p. 4). Dr. Sawyer's initial impression was that Claimant had urinary incontinence and urge incontinence of unclear etiology but opined that it was likely due to a neurogenic bladder as a result of his back injury. *Id*. at 3. Dr. Sawyer also thought Claimant had benign prostatic hypertrophy, fecal incontinence, hypertension, DM type II asbestosis, Asthma with possible COPD, ASCVD with angina, SP surgery on right shoulder, SP excision of skin cancers, recurrent pneumonia, erectile dysfunction which may either be vascular or neruogenic. *Id*. A pelvic ultrasound, performed on April 24, 2001, showed a somewhat misshapen urinary bladder extending superiorly out of the pelvis. *Id*. at 6. An abdomen ultrasound, performed on May 4, 2001, mild bilateral nephromegaly and hepatomegaly. *Id*. at 5.

Accordingly the nature of Claimant's injury is such that he suffers grade II spondylolisthesis of L5-S1, which exerts a traction on the L5 nerve root causing neurogenic claudation type pain; severe bilateral forminal stenosis at L5-S1; a moderate sized central L5-S1 disc herniation; ventral defects at L2-3 and L3-4; spinal stenosis at L2-3, and L3-4; a broad based central protrusion at L3-4; degenerative disc disease; degenerative and arthritic changes in the neck; a small disc herniation at C4-5; a herniated necleus pulposus at C4-5; a frozen shoulder, a right shoulder rotator cuff degenerative disease with spurring on the articular edges; supraspinatus tendon with fraying, minimal osteoarthritis of the shoulder; massive obesity; hypertension; and high blood pressure.

D(2) Maximum Medical Improvement

Drs. McCloskey and Smith clearly recommended lumbar surgery on Claimant if he lost at least one-hundred pounds. (CX 12, p. 79, 85). Dr. Connolly recommended surgery if Claimant lost about seventy-five pounds and showed evidence of nerve root signs or a progressive slip. (CX 13, p.1). From December 1998, to May, 1999, Claimant attempted to lose weight in a medically supervised program but failed. (CX 14, p. 1). At trial Claimant still had not lost any weight. (Tr. 52). Because Claimant is completely unable to lose the necessary weight to have Dr. McCloskey's lumbar surgery, I conclude that his lumbar condition is permanent, and that he reached MMI in regards to his lumbar area on June 30, 1999, when Dr. McCloskey noted that Claimant's weigh loss attempt was a failure and that Claimant was over a year post injury. (EX 12, p. 20). The only lumbar treatment claimant received after this date was injection administered by Dr. Chen in an attempt to manage Claimant's pain, and Dr. Chen refused to administer any more injections after January 18, 2001. (CX 19, p. 2).

With regard to his shoulder injury, I do not find that Claimant has reached maximum medical improvement. Both Claimant and Dr. Savoie contemplate future shoulder replacement. (Tr. 60). Also, Dr. Sawyer, who directly linked Claimant's urinary incontinence to his workplace injury, contemplated future surgery. (CX 18, p. 1-2, 8). Accordingly, I find that Claimant has not yet reached maximum medical improvement with regards to his shoulder and urinary incontinence.

D(3) Extent of Claimant's Injury

On March 11, 1998, Dr. Doster limited Claimant to light duty work until his pain resolved, specifically limiting Claimant to no bending, climbing, prolonged standing, and no lifting greater than twenty pounds. (CX 15, p. 15). On April 2, 1998, Dr. Doster's new impression was that Claimant had [l]umbar back pain, spondylolisis, probable degenerative disc disease and osteoarthritis," and Dr. Doster recommended that Claimant not return to work. *Id*. at 8, 12. On April 8, 1998, however, Dr. Doster decided to return Claimant to light duty work with no lifting over twenty pounds because of his improved lumbar back pain and spondylolisis. *Id*. at 6. These work restrictions were continued indefinitely by Dr. Doster on April 22, 1998, when a CT scan revealed that the L5 disc had a "prominent vacuum phenomenon with prominent spurring extending out from its articular edges." *Id*. at 1-2.

On September 9, 1998, Dr. McCloskey assigned a ten percent permanent partial physical impairment to the whole body and limited Claimant to sedentary work. (CX 12, p. 82). Dr. McCloskey opined, however, that Claimant continued to need medical treatment and may end up having to undergo surgery. *Id*. On June 30, 1999, Dr. McCloskey noted that Claimant was having difficulty driving a car for long distances and that

Claimant felt totally incapacitated. *Id*. at 25. Because Claimant was over a year post-injury, Dr. McCloskey opined that Claimant had reached maximum medical improvement and was limited on what he could do on a permanent basis. *Id*. at 20.

On October 11, 1999, Dr. McCloskey assigned a fifteen percent permanent partial impairment to the whole body as a result of his back injury and opined that Claimant was permanently limited to sedentary or very light type work. (CX 12, p. 12). Although he ordered x-rays for Claimant's neck and shoulders, Dr. McCloskey stated that he had no plans for surgery and advised Claimant on obtaining Social Security Disability. *Id*.

On April 25, 2000, Dr. McCloskey's diagnosed a frozen shoulder and herniated necleus pulposus at C4-5, and stated that Claimant had reached maximum medical improvement with a 5% permanent partial impairment to his body as a whole, which combined with a 15% impairment to the body as a whole due to his back condition, created a 20% total permanent partial physical impairment. (CX 12, p. 2).

On May 23, 2000, Dr. Wiggins treated Claimant for frozen shoulder syndrome on a referral from Dr. McCloskey. (CX 17, p. 7). Dr. Wiggins revoked Dr. McCloskey's return to work status and stated that it was unlikely Claimant would return to work at all. *Id*. at 7. On June 27, 2000, Dr. Wiggins diagnosed a torn right rotator cuff and advised Claimant on surgery and rotator cuff repair. *Id*. at 1. Dr. Wiggins further stated that a twenty percent permanent partial disability to the right upper extremity was appropriate for Claimant based on his condition. *Id*.

Dr. Savoie, of the Mississippi Sports Medicine & Orthopaedic Center, first treated Claimant for his shoulder on August 16, 2000. (CX 16, p. 2). Claimant elected to undergo surgery which entailed "arthroscopic clean out [with] . . . laser chondroplasty, decompression, Mumford and cuff repair" on December 4, 2000 *Id*. (Tr. 55). Dr. Savoie discussed performing another operation on Claimant for a complete shoulder replacement, and the record lacks any impairment rating by Dr. Savoie concerning Claimant's shoulder. (Tr. 60). At trial, however, Claimant testified that Dr. Savoie had limited him to lifting two pounds following his shoulder surgery. (Tr. 63).

Accordingly, the extent of Claimant's injury is such that he suffers a fifteen percent whole person disability rating due to his lumbar condition, and is limited to sedentary or very light work based on that condition. The extent of Claimant's disability due to his shoulder, while rated as high as twenty percent to the right upper extremity prior to surgery by Dr. Wiggins, and rated as a 5% whole body impairment by Dr. McCloskey, is yet undetermined because since those assessments Claimant has undergone surgery and future surgery is contemplated. In the meantime, Dr. Savoie has limited Claimant to lifting no more than two pounds.[3] Therefore, I find that Claimant is temporarily totally disabled within the meaning of the Act.

---

[3] Because Claimant has not reached maximum medical improvement with regards to his shoulder, and Dr. Savoie has limited Claimant to lifting no more than two pounds, I find it inappropriate to make a determination of whether Claimant can obtain alternative employment within those restrictions prior to reaching MMI. In any event, the two pound lifting restriction would remove Claimant from consideration of even sedentary work, as that entails exerting up to ten pounds of force occasionally. DICTIONARY OF OCCUPATIONAL TITLES, Appendix C, (4th Ed. Rev. 1991). Thus, no

E. Medical Authorization

Under Section 7(a) of the Act, the employer/carrier "shall furnish such medical, surgical, and other attendance or treatment, . . .for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). Under Section 7(c)(2) of the act the employer/carrier must "authorize medical treatment and care from a physician selected by an employee . . . . [and a]n employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change."

To the extent that Employer/Carrier has not already done so, Claimant is entitled to continued treatment by Dr. Sawyer for urinary incontinence, treatment by Dr. Savoie for his shoulder, and if Claimant desires, there is no principled reason why Claimant cannot be treated for his shoulder at the Southern Bone and Joint Clinic in Hattiesburg, Mississippi because that clinic is a mere fifty-eight miles from Claimant's residence as opposed to the 180 mile drive to Jackson, Mississippi to be treated by Dr. Savoie. (Tr. 70-71).

F. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

F(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Jurisprudence interpreting Section 10(a) establishes the meaning of "substantially the whole year." *See Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148, 155 (1979)(finding that 33 weeks was not substantially the whole year); *Stand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, 850 (1979)(finding that 36 weeks was not substantially the whole year); *Mallory v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 516, 519 (1999)(ALJ)(finding that a person who works less than half the preceding year cannot be said to have worked "substantially the whole year"). *Cf. Eleaver v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977)(finding 28 weeks of employment sufficient because claimant's work was regular and continuous); *Amon v. Ceres Marine Terminal*, 2001-LHC-0295, n.4; 2001 WL 1451099 *4 (DOL Ben. Rev. Bd. 2001)(ALJ)(indicating that 28.43 weeks was substantially the whole year considering claimant's work was "continuous and uninterrupted"). Here, Claimant only worked for Employer from January 29, 1998, to March 31, 1998, a period of 8.85 weeks, and this time frame cannot be characterized as substantially the whole of the year making a Section 10(a) calculation inappropriate.

---

job that Mr. Miller identified would be suitable.

F(2) Section 10(b)

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153. Here, there are no similar situated workers in the record upon which to base a Section 10(b) calculation.

F(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly", then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. The Board will affirm a determination of average weekly wage under Section 10(c) if the amount represents a reasonable estimate of Claimant's earning capacity at the time of the injury. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

Claimant argues that he worked a total of thirty days from his date of hire on January 29, 1998 to the date of his accident on March 8, 1998, a period encompassing thirty-seven days. During this period Claimant earned $4,370.00, representing an average daily earning rate of $145.67 per day. ($4,370.00 ÷ 30). Assuming, that he would have maintained this average earning, Claimant argues that his annual wages would have been $43,110.45, which equates to an average weekly wage of $829.05. (365 x 30/37 days = 295.95 days worked per year x $145.67 = $43,110.45).

The record reveals the following wage information:

Pay Date	Days Worked	Amount Paid
02/08/98	6	882.83
02/22/98	11	1575.51
03/08/98	13	1911.67
03/22/98	8	1147.68
04/05/98	9	1544.97

(EX 8, p. 2).

Employer has not opposed Claimant's calculation of his average weekly wage.[4] I find that Claimant's calculation best reflects his earning capacity at the time he was injured. Using data after March 8, 1998 would incorporate days Claimant missed because of doctor's appointments, and days that may have been artificially shortened while Claimant was performing light duty work because of his injury. Accordingly, I find that Claimant's average weekly wage at the time of his injury was $829.05, with a corresponding compensation rate of $552.70 per week.

G. Section 3(e) Credit

Under Section 3(e) of the Act, "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law. . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 903(e) (2001). Accordingly,

[4] At hearing, Employer asserted Claimant's average weekly wage was $489.00 per week, but this point was not argued in Employer's post-hearing brief. Employer gives no factual support for this assertion.

Employer is entitled to a credit for all benefits paid under the Mississippi State Workers' Compensation Act, which totaled 54,277.32 in wages benefits at the date of the hearing.

H. Penalties

Under Section 14(e) of the Act, "[i]f any installment of compensation payable without an award is not paid within fourteen days after it becomes due . . . there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice [of controversion] is filed . . . or unless such nonpayment is excused by the deputy commissioner. . . ." 33 U.S.C. § 914(e) (2001).

Here, Claimant filed two claim for compensation, one dated November 27, 2000, and the second dated July 27, 2001. (CX 2, p. 1-2). The Department of Labor sent notice to Employer on December 11, 2000, and again on August 1, 2001. (CX 3, p. 1-2). Employer timely controverted both claims, the first on December 7, 2000, and the second on August 6, 2001. Accordingly, no penalties are due under the Act.

I. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

J. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days

following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Claimant has not established that he is subject to jurisdiction under the Act. Therefore, Claimant's petition for benefits under the Act is DENIED.[5]

A
CLEMENT J. KENNINGTON
Administrative Law Judge

---

[5] In the Alternative, should the Board determine that Claimant had a maritime status, I find that Claimant's entitlement to benefits under the Act is DENIED based on his inability to meet the situs requirement for jurisdiction under the Act.

In the Alternative, should the Board determine that jurisdiction is proper, I enter the following order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 31, 1998, and continuing, based on an average weekly wage of $829.05 per week and a corresponding compensation rate of $552.70 per week.

2. Employer shall be entitled to a credit for all compensation paid to Claimant after March 31, 1998.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.